(1) 89-974

In The

Supreme Court of the United States

October Term, 1989

PETROLEO BRASILEIRO, S.A.,

Petitioner,

vs.

ATWOOD TURNKEY DRILLING, INC. and ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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63 (RH)

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred in holding that Petroleo Brasileiro S.A. ("Petrobras"), an agency or instrumentality of the Brazilian government accorded the rights of sovereigns under the Foreign Sovereign Immunities Act, waived its immunity from prejudgment attachment even though the contract governing the dispute between Petrobras and respondents did not provide for such a waiver and the only claimed basis for waiver vis-a-vis respondents was a waiver in a contract between Petrobras and its lenders, to which respondents were not parties.

PARTIES TO THE PROCEEDING

1. Atwood Turnkey Drilling, Inc. — Plaintiff.

2. Atwood do Brasil Servicos de Assistencia Maritima, Ltda. — Plaintiff.

3. Petroleo Brasileiro, S.A. (Petrobras) — Defendant.

4. Internor Trade, Inc. — Defendant.

5. International Underwater Contractors, Inc. — Defendant.

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OPINION BELOW

The opinion is reported at 875 F.2d 1174 (5th Cir. 1989) and is reproduced in the Appendix (1a).

STATEMENT OF JURISDICTION

The judgment appealed from was rendered by the Fifth

Circuit on June 27, 1989. Petitioner's petition for rehearing was denied by order dated September 19, 1989 which is reproduced in the Appendix (11a). The jurisdictional authority for this Court to review the judgment by writ of certiorari is contained in 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutory provisions are applicable to this case:

1. 28 U.S.C. § 1330(a)

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title . . .

2. 28 U.S.C. § 1603

> . . . For purposes of this chapter --
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority

of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country . . . .

3. 28 U.S.C. § 1605(a)(1)

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

4. 28 U.S.C. § 1609

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

5. 28 U.S.C. § 1610(a)(1)

> Exceptions to the immunity from attachment or execution
>
> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --
>
> > (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or . . . .

6. 28 U.S.C. § 1610(d)

> (d) The property of a foreign state as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --
>
> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment,

> notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, ...

STATEMENT OF THE CASE

On or about August 28, 1985, plaintiffs Atwood Turnkey Drilling, Inc. and Atwood do Brasil Servicos de Assistencia Maritima Ltda. ("Atwood") (respondents herein) and defendant Petroleo Brasileiro, S.A. (hereafter "Petrobras") (petitioner herein) entered into a contract under the terms of which Atwood was to drill 21 wells in the Vermelho Field, Campos Basin, offshore Brazil. The contract was later amended to provide for the drilling of only 17 wells.

The contract was executed in Brazil, was to be performed exclusively off the coast of Brazil, and was executed in the Portuguese language. It provided that all disputes arising from the contract were to be determined in the courts of the City of Rio de Janeiro, Brazil and further provided for appointment of an agent by respondents to receive service of process in Brazil. Finally, the contract mandated that Brazilian law would govern the contract and any disputes that might arise thereunder.

Petitioner Petrobras was created under Brazilian law as the government oil company and the statute pursuant to which Petrobras was created provides that the Brazilian government must own at least 51 percent of the stock of Petrobras at all times. The Court of Appeals for the Fifth Circuit held that Petrobras is a sovereign under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (hereafter "FSIA"), and is entitled to the privileges accorded a sovereign therein.

To facilitate drilling of wells in its Campos Basin field, Petrobras entered into an agreement with First Interstate Bank

of California ("First Interstate") and the Export-Import Bank of the United States ("Eximbank") pursuant to which certain payments for drilling services in the Campos Basin were to be made by letter of credit drawn on First Interstate or Eximbank (hereafter "the lenders") and guaranteed by the Eximbank (hereafter "First Interstate Agreement"). The First Interstate Agreement set forth the terms under which First Interstate and Eximbank would finance the drilling, the credit terms granted to Petrobras, and included various clauses meant to insure repayment of the sums extended by the lenders. (Selected portions of the agreement are reproduced in the appendix at 19a-28a.)

To secure repayment of any sums paid by the lenders on Petrobras' behalf, Petrobras agreed to execute and did execute a series of promissory notes in the lenders' favor. In addition, Petrobras consented to the jurisdiction of the California and District of Columbia courts and waived all its sovereign rights in any legal action or proceeding arising out of or relating to the First Interstate Agreement or the notes executed in favor of the lenders.

This lawsuit arose because of Atwood's failure to perform in the manner required by the contract. When Atwood proved unable to perform in a satisfactory manner, Petrobras terminated the contract in December 1986 in accordance with the provisions of the contract.

Respondents Atwood Turnkey Drilling, Inc. and Atwood do Brasil Servicos de Assistencia Maritima Ltda. thereafter commenced suit against Petrobras in Texas state court on April 30, 1987 (33a). On May 13, 1987 petitioner Petrobras filed its petition for removal pursuant to the provisions of 28 U.S.C. § 1446(b) and 28 U.S.C. § 1602, *et seq.* An answer was also filed on behalf of petitioner Petrobras on May 13, 1987.

On January 20, 1988, respondents made an application to the district court for a temporary restraining order or preliminary injunction seeking an order requiring Petrobras to extend the terms of a letter credit in favor of respondents due to expire on January 28, 1988. On January 28, 1988, the court entered a temporary restraining order requiring petitioner to extend the letter of credit for ten days with a ten-day extension, if necessary. By the terms of the January 28, 1988 order, the temporary restraining order expired on February 17, 1988. The letter of credit expired on that date.

After the expiration of the temporary restraining order and the expiration of the letter of credit of the lenders, the court ordered a preliminary injunction hearing to be held before the Hon. Karen K. Brown, United States Magistrate, on February 26, 1988. At the conclusion of the hearing, the Magistrate recommended to the district judge that a preliminary injunction be entered ordering petitioner to reinstate the expired letter of credit and further ordering that petitioner request the Eximbank to extend the guarantees in the credit agreement, securing the letter of credit. The order, as recommended by the Magistrate, was signed by the Hon. John V. Singleton, Jr. on February 26, 1988.

Petitioner perfected its appeal to the United States Court of Appeals for the Fifth Circuit. By opinion dated June 27, 1989, the Fifth Circuit concluded that Petrobras had waived its immunity from prejudgment attachment with respect to Atwood because of its agreement to waive immunity vis-a-vis the lenders. On September 19, 1989, the Fifth Circuit corrected an error in its slip opinion and denied petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT

Question: Whether the United States Court of Appeals for the Fifth Circuit erred in holding that Petroleo Brasileiro S.A. ("Petrobras"), an agency or instrumentality of the Brazilian government accorded the rights of sovereigns under the Foreign Sovereign Immunities Act, waived its immunity from prejudgment attachment even though the contract governing the dispute between Petrobras and respondents did not provide for such a waiver and the only claimed basis for waiver vis-a-vis respondents was a waiver in a contract between Petrobras and its lenders, to which respondents were not parties.

This petition raises fundamental questions about the rights of sovereigns under the FSIA and the circumstances under which a sovereign may be deemed to have waived immunity from prejudgment attachment. Such issue is ripe for review by this Court, as it has never addressed the critical question of what constitutes explicit waiver of a sovereign's rights under the Foreign Sovereign Immunities Act.

Petitioner asserts that the Fifth Circuit has violated both its sovereign rights and the intent of Congress in holding that petitioner has waived its sovereign immunity against prejudgment attachment notwithstanding the fact that the contract governing the parties' dispute does not evince any waiver. Furthermore, petitioner asserts that the Fifth Circuit errs in holding that a sovereign waive its rights of immunity from prejudgment attachn ent in an instance where the party asserting such waiver is not a party to any contract where such rights are waived.

A. Prejudgment Attachment Against a Sovereign Is an Extraordinary Remedy Granted Only If a Sovereign Explicitly Waives Its Immunity from Such Attachment.

The rights and immunities of sovereigns are governed by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* ("FSIA"). In the FSIA Congress carefully restricted the instances and circumstances under which a sovereign's property could be attached.

Congress recognized that prejudgment attachments are "potentially more harassing than post-judgment attachments" and therefore required an explicit waiver of immunity as a prerequisite for prejudgment attachment. *See Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979); *see also, New England Merchants National Bank v. Iran Power Generation and Transmission Company,* 502 F. Supp. 120 (S.D.N.Y. 1980). ("Congress recognized that pre-judgment attachment is an extraordinary and harsh remedy not to be lightly waived. Instead, only the clearest of waivers will subject a foreign state to this extraordinary remedy." *Id.* at 126).

Under the FSIA, foreign states and agencies are immune from prejudgment attachment unless the state or agency explicitly waives its immunity. 28 U.S.C. 1610(d). Section 1610(d) provides that the property of a foreign state shall not be immune from prejudgment attachment if: "the foreign state has explicitly waived its immunity from attachment prior to judgment." *Id.* As stated in the legislative history relating to this section of the FSIA, "Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment." (1976 *U.S. Code Cong. & Ad. News,* p. 6629). Thus, it is clear that sovereigns are immune from prejudgment attachment absent an explicit waiver of immunity of this right. Furthermore, this

immunity can only be waived by unmistakable and plain language and the waiver must demonstrate unambiguously the foreign state's intention to waive immunity from prejudgment attachment. *See S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983), *cert. denied*, 464 U.S. 850, 104 S. Ct. 161, 78 L.E. 2d 147.

The contract between the parties to this appeal, dated August 28, 1985, governs the litigation between the parties to this appeal (portions of a certified translation of the original Portuguese contract is reproduced in the Appendix to this petition at 29a-32a). The contract does not evidence any inclination on Petrobras' part to relinquish its sovereign immunities. On the contrary, the contract demonstrates that Brazilian law applies and that all disputes arising under the contract are to be determined by the courts of the City of Rio de Janeiro in Brazil.[1] Clearly, the contract demonstrates that Petrobras did not intend and did not agree to any litigation in the United States, let alone waive its rights to sovereign immunity from prejudgment attachment. Therefore, this Court should vacate the prejudgment attachment which is violative of Petrobras' sovereign rights and outside the limited statutory exception pursuant to which sovereigns are subject to prejudgment attachment.

B. Congress Intended to Preclude Inadvertent or Constructive Waiver.

Congress specifically authorized explicit and implicit waivers of immunity from post-judgment attachment. 28 U.S.C. § 1610(a).

---

1. Clause 22.1 of the contract provides that Atwood will maintain an agent in Brazil with the power to receive summonses, participate in proceedings and sign agreements in connection with disputes arising from the contract. Clause 25.1 of the contract provides that the courts of the City of Rio de Janeiro will be competent to rule on any questions deriving from the contract and that the parties waive any other jurisdiction.

However, Congress required that waiver of immunity from prejudgment attachment must be explicit. Given the fact that Congress specifically excluded implicit waiver of immunity from prejudgment attachment, Congress meant to preclude unintended or constructive waiver of immunity from prejudgment attachment. *S&S Machinery Co. v. Masinexportimport, supra.*

The Fifth Circuit erred as a matter of law in finding a waiver of immunity by Petrobras vis-a-vis respondents from a financing agreement by Petrobras with First Interstate and Eximbank ("First Interstate Agreement"), to which Atwood was not a party. This agreement set forth the amount of bank credit extended to Petrobras by the lenders, interest and payment terms, fees, and borrower's representations and warranties. In addition to the payment terms and the requirement that Petrobras execute promissory notes, the First Interstate Agreement includes a section, Article IX, titled "Jurisdiction." This section provides for jurisdiction of the courts in the State of California or the District of Columbia in "any legal action or proceeding *arising out of or relating to this Agreement or the Notes*" (emphasis added) and further provided that Petrobras irrevocably submitted to the non-exclusive jurisdiction of these courts. Finally, in this section Petrobras appointed the general manager of its New York office as agent for service and waived any right of immunity arising out of or relating to the First Interstate Agreement or the notes.

The "jurisdiction" section of the First Interstate Agreement was intended to apply in any action brought by First Interstate or Eximbank to collect sums extended under the First Interstate Agreement and to insure that the lenders could obtain jurisdiction over Petrobras in the United States. The First Interstate Agreement specifically provides in Clause L of Article X — Benefit of Agreement — that the agreement is binding upon and shall inure to the benefit of each of the parties and their successors and assigns. Thus, the contract by its terms is limited to the parties

and their successors or assigns and the limited waiver of immunity in the contract by Petrobras cannot inure to entities not party to the contract.

Furthermore, given that the purpose of the jurisdiction clause is to provide protection to the lenders, who were identified in the contract to be the only beneficiaries of the contract, any claimed benefit running to Atwood would be an unintended waiver which is insufficient to support a waiver of immunity from prejudgment attachment. *See S&S Machinery v. Masinexportimport, supra.*

The Petrobras contract with respondents proves conclusively that Petrobras did not intend to waive sovereign rights vis-a-vis the respondents. Further, the "Benefit of Agreement" clause and the whole focus of the First Interstate Agreement demonstrates that the jurisdictional provisions contained therein were limited to disputes under the Agreement or the notes and were not meant to apply to third parties. Therefore, the First Interstate Agreement does not in any fashion serve as a waiver of immunity vis-a-vis the respondents, who were not a party to the financing agreement. Assuming *arguendo*, that the First Interstate Agreement could be contorted into a general waiver, the so-called waiver would be ineffective because Congress precluded unintended waiver of immunity (*see S&S Machinery v. Masinexportimport, supra*), and the Petrobras-Atwood contract conclusively proves that Petrobras did not intend to make such a waiver.

The purpose of 28 U.S.C. § 1610(d)(1) is to preclude inadvertent, implied, or constructive waiver in instances where the intent of the foreign state was equivocal or ambiguous. *Schwartz v. Merchants Bank of New York,* 109 A.D. 2d 108, 490 N.Y.S. 2d 194 (1st Dep't 1985), *citing Libra Bank Ltd. v. Banco Nacional de Costa Rica,* 676 F.2d 47 (2d Cir. 1982). Given the fact that the Atwood contract does not provide for any waiver,

any theoretical waiver conceivably relevant to Atwood from the First Interstate Agreement is contradictory with the Atwood agreement, and the intent to give a waiver to Atwood is thus at most quite equivocal and ambiguous. (In fact, the Atwood agreement and the First Interstate Agreement do not evidence any intention on the part of Petrobras to waive immunity from prejudgment attachment vis-a-vis Atwood.) Therefore, the Fifth Circuit erred in finding an explicit waiver vis-a-vis Atwood and this Court should vacate the attachment based on this error.

C. The Waiver Contained Within the Agreement with First Interstate and Eximbank Only Protects Them and Not Third Parties.

As noted by the court in *Zernicek v. Petroleos Mexicanos (PEMEX)*, 614 F. Supp. 407 (D.D.C. Tex. 1985), *aff'd*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 108 S.C. 775, a line of cases have held that a country's waiver of immunity does not apply to third parties not privy to the contract. In *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787 (D.D.C. 1985), Transportes, an agency of the Ecuadorian government, had a credit agreement with American banks and other institutions to finance part of the cost of an aircraft which later crashed. The credit agreement required Transportes to submit to New York courts in any actions arising out of or relating to the agreement. The court held that the waiver of immunity in the agreement did not apply to the plaintiff, not a party to the agreement, who had been injured in a crash of the plane financed under the agreement with the American banks.

Similarly, in *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (dicta), the court addressed an agreement by a Turkish government entity to arbitrate any disputes arising from its agreement with Firearms Center Inc. ("FCI"). The court noted that the waiver could not be interpreted

to include the dispute in the suit before it because the case involved an injury to a third party and did not call into issue the contract between the Turkish entity and FCI.

See also, Kramer v. Boeing Co., 705 F. Supp. 1392 (D. Minn. 1989). Thus, the courts have consistently circumscribed waivers of sovereign immunity to the actual parties and circumstances contemplated by the waiving party.

In the instant case the Atwood entities were not parties to the contract and their claim does not call into issue the contract between Petrobras and the banks. Therefore, Atwood cannot take advantage of the waiver in the First Interstate Agreement. This rationale is especially cogent in the instant action because Atwood and Petrobras have a detailed contract governing their dispute which simply does not evince or include a waiver of immunity. Given this governing contract, it is unreasonable to infer a waiver of immunity from a contract to which the Atwood entities were not a party.

Although these cases relate to waiver of immunity from jurisdiction under Section 1605(a)(1) of the FSIA, the legislative history indicates that the concept of explicit and implied waivers under Section 1610 is governed by the principles that apply to waiver of immunity under Section 1605. 1976 *U.S. Code Cong. & Ad. News*, 6604, 6627.[2] So, the holdings that preclude waiver of immunity by a sovereign vis-a-vis a party not privy to a contract where a waiver is made are also applicable to and preclude a determination of waiver of immunity by a sovereign vis-a-vis a third party in the context of prejudgment attachment.

---

2. The legislative history makes the comparison of explicit and implicit waiver in section 1610(a)(1), which addresses implied and explicit waivers of immunity after judgment, with section 1605.

Petitioner acknowledges that the letters of credit issued pursuant to the First Interstate Agreement were used to finance the Atwood drilling. However, Atwood was not a party to the Agreement and rights under the Agreement were specifically limited by Article X, Clause L, to the parties, their successors and assigns. Thus, the First Interstate Agreement by its very terms applies only to the lenders and Atwood, falling outside this class, can receive no privileges under that Agreement.

CONCLUSION

The Court of Appeals for the Fifth Circuit, in permitting prejudgment attachment against a sovereign, erred in three ways, each of which individually requires that the order of the Court of Appeals be reversed:

A. There must be explicit waiver of immunity from prejudgment attachment, and Petrobras did not explicitly waive immunity vis-a-vis Atwood;

B. Waiver cannot be equivocal or unintended and since the waiver in the agreement with First Interstate was not intended to apply to Atwood and was in conflict with the governing Petrobras-Atwood contract, there is no unequivocal waiver; and

C. A waiver in a contract binds the sovereign only in relation to the signatories to the contract and is not a waiver of immunity against third parties who did not sign the contract.

Thus, it is evident that the Fifth Circuit erred in its decision and its order should be vacated. Most importantly, the error should be addressed by this Court because it raises significant issues of international comity regarding the immunity of sovereigns from prejudgment attachment. The willingness of sovereigns to do business with American entities will be chilled if sovereigns can

be inadvertently subjected to the substantial and damaging effect of prejudgment attachment in cases where there has been a waiver granted to any party. Finally, the Fifth Circuit's error creates incorrect confusion about waiver of immunity under the Foreign Sovereign Immunities Act. The need to clarify the nature of waiver of sovereign immunity should compel this Court to grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE FIFTH CIRCUIT DATED JUNE 27, 1989

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-2302

ATWOOD TURNKEY DRILLING, INC., et al,

Plaintiffs-Appellees,

v.

PETROLEO BRASILEIRO, S.A.,

Defendant-Appellant,

v.

INTERNATIONAL UNDERWATER CONTRACTORS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

DUHE, Circuit Judge:

In this breach of contract case the national oil company of Brazil, Petroleo Brasileiro, S.A. (Petrobras), seeks interlocutory review of a preliminary injunction granted by the district court. We affirm.

Appendix A

FACT

Petrobras contracted with an American company, Atwood Turnkey Drilling, Inc., et al, (Atwood), for the drilling of oil wells off the coast of Brazil. As security for the sums due Atwood under the contract, Petrobras furnished Atwood a letter of credit issued by an American bank and guaranteed by the Export Import Bank of the United States (EXIM). Following Petrobras's alleged refusal to pay Atwood for work it had performed, Atwood sued Petrobras for breach of contract. Because the letter of credit and the EXIM guarantee were due to expire by their own terms, Atwood applied for a temporary restraining order and/or a preliminary injunction maintaining them in effect. The district court issued a temporary restraining order extending the letter of credit for a brief period of time. That order subsequently expired. The preliminary injunction hearing occured and the district court granted Atwood's motion for a preliminary injunction. The court ordered Petrobras to extend or reinstate the letter of credit and to request EXIM to extend its guarantee. The extensions were to continue for one year from the date of the order or until all issues pertinent to the letter of credit were resolved. Petrobras appealed.

JURISDICTION

At the outset we must determine whether we have jurisdiction to hear Petrobras's appeal. 28 U.S.C. § 1292(a)(1), gives this court jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court." Although the order appealed from in this case specifically grants a preliminary injunction, Atwood contends that this court lacks jurisdiction. It cites *Carson*

v. American Brands, Inc., 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) for the proposition that appellate courts do not have jurisdiction of appeals from interlocutory orders granting injunctions under § 1292(a)(1) *unless* the litigant can show both that the interlocutory order might have a serious, perhaps irreparable, consequence, and that the order can be effectively challenged only by immediate appeal.

Petrobras contends that the additional requirement in *Carson*, that the order might have a "serious, perhaps irreparable, consequence", does not apply to orders, such as the one in the instant case, which specifically grant injunctive relief but only to orders not denominated injunctions but which have the practical effect of granting injunctive relief.

Petrobras is correct. Atwood's analysis of the *Carson* case is faulty. The orders at issue in *Carson*, and the two cases it relied on, *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978) and *Switzerland Cheese Ass'n., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966), were not denominated injunctions, they merely had the practical effect of an injunction. We hold that *Carson*, does not apply to orders specifically granting or denying injunctions. Accordingly, we have jurisdiction of Petrobras's appeal under § 1292(a)(1).

SOVEREIGN IMMUNITY

Petrobras contends that enjoining it to reinstate the letter of credit is not permissible under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* The first question is whether Petrobras is entitled to the benefits of the FSIA. Section 1603 of the FSIA provides that agencies and instrumentalities of

a foreign state are considered foreign states, entitled to the benefits of the FSIA, if they are a separate legal person, the majority of their shares are owned by a foreign state; and they are neither a citizen of a state of the United States, nor created under the laws of any third country.

Atwood correctly asserts the lack of evidence in the trial court record that Petrobras is a sovereign. However, Fed.R.Civ.P. 44.1 states that in determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. Petrobras has provided this court with a copy of the Brazilian law creating it. The law provides that Petrobras is a separate legal person and that the government of Brazil owns a majority of Petrobras's shares. Additionally, Petrobras has been recognized as a foreign sovereign entitled to the benefits of the FSIA in other cases in the United States District Courts. *Spensley v. Racal-Decca Survey*, C.A. No. H-81-2489, 1983 AMC 767 (S.D.Tex.1982); *Evans v. Petroleo Brasileiro, S.A.*, C.A. No. H-83-91, 1985 AMC 1614, 1984 WL 1887 (S.D.Tex.1984). We hold that Petrobras is entitled to sovereign immunity under the FSIA.

Having determined that Petrobras is entitled to sovereign immunity we turn to Petrobras's contention that the Act prohibits this injunction as a prejudgment attachment. The FSIA sets out the general principle that property of a foreign state in the United States is immune from attachment. 28 U.S.C. § 1609. The exceptions to this general principle are stated in § 1610. Subdivision (d) of that section provides that a foreign sovereign's property in the United States used for commercial purposes *is* subject to prejudgment attachment if:

Appendix A

1) Immunity from attachment prior to judgment has been explicitly waived; and

2) The purpose of the attachment is to secure satisfaction of a judgment that may ultimately be entered against the sovereign.

Atwood contends that Petrobras has waived its immunity to prejudgment attachment. Our review of the record indicates that Atwood is correct. Article IX Paragraph B of the letter of credit states:

> B. *Waiver of sovereign immunity.*
>
> The Borrower [Petrobras] acknowledges and agrees that the activities contemplated by the provisions of this agreement and the notes are commercial in nature rather than governmental or public and therefore acknowledges and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this agreement or the notes. The Borrower . . . expressly and irrevocably waives any such right of immunity (including any immunity from the jurisdiction of any court or *from any execution or attachment in aid of execution prior to judgment or otherwise)* or claim thereto which may now or hereafter exist, and agrees not to assert any such right or claim in any such action or proceeding, whether in the United States or otherwise. (emphasis added).

Appendix A

The instant case clearly relates to the letter of credit. Accordingly, the waiver provision applies and Petrobras is precluded from asserting sovereign immunity as a defense in this action. Furthermore, the parties do not dispute that the purpose of the injunction is to secure the payment of a judgment which may be rendered in the litigation. Accordingly, Petrobras's property in the United States used for commercial purposes is subject to prejudgment attachment, whether by means of an injunction or more traditional methods of attachment.

Adequacy of Notice

Petrobras contends that it was not given a fair opportunity to contest the TRO or the preliminary injunction because the trial court did not give it adequate notice of the hearings. On January 20, 1988, Atwood filed an "Application for TRO and/or Preliminary Injunction". On January 21, 1988 the district court conducted a hearing on the TRO. Petrobras contends it was only given a few hours notice of this hearing and therefore it was unable to marshal any evidence or defense to the motion. The TRO issued on January 28, 1988 and the preliminary injunction hearing was held on February 26, 1988. Petrobras contends that it received less than twenty-four hours notice of this hearing and that, considering its status as a foreign defendant, this was inadequate, unfair and deprived it of its due process rights. Petrobras argues it did not have time to produce a witness or to provide affidavits. It further states that it did not offer any affidavits at the TRO hearing because the trial court informed it that if a TRO issued, Petrobras would be given advance notice of the preliminary injunction hearing so that it could present witnesses and evidence. Petrobras also complains that it was not given advance notice that Atwood was requesting that the EXIM guarantee be extended and only found this out on the morning of the preliminary

injuction hearing.

Petrobras points out that Fed.R.Civ.P. 65(a)(1) provides that no preliminary injunction shall issue without notice. Because Rule 65 is silent about when notice must be given and because a motion is the "appropriate" procedure for requesting a preliminary injunction, Petrobras urges us to apply the five-day notice requirement found in Fed.R.Civ.P. 6(d) which states that written motion, other than the one which may be heard *ex parte* must be served, along with notice of the hearing, not later than five days before the time set for the hearing.

Petrobras's complaint about lack of notice is unsupportable. It clearly knew there would be a hearing as soon as court congestion allowed. It had more than a month from the time that Atwood filed its application for injunctive relief to obtain affidavits, file documents, and produce witnesses for depositions. The record reveals that at the preliminary injunction hearing the trial court offered Petrobras the opportunity to produce its witnesses at a later date. Petrobras, for whatever reason, chose not to avail itself of this opportunity. Furthermore, despite not knowing the exact date of the hearing prudent counsel would have been aware of the need to meet the issue when it arose.

PROPRIETY OF INJUNCTION

The final issue is whether the trial court abused its discretion when it issued the preliminary injunction reinstating the letter of credit. The primary justification for granting a preliminary injunction is to preserve the court's ability to render a meaningful decision on the merits. To secure a preliminary injunction, the movant must prove four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable

injury if the injunction does not issue; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest. *Canal Authority v. Callaway,* 489 F.2d 567 (5th Cir.1974).

Petrobras challenges the district court's findings on the first two factors.[1] The trial court adopted the findings and conclusions of the magistrate. The magistrate did not, however, make any findings of fact, she merely stated conclusions of law.[2] In reviewing the district court's reasons for judgment we must uphold its findings of fact unless they are clearly erroneous. The court's conclusions of law, however, are subject to broad review and will be reversed if incorrect. *Enterprise International v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464 (5th Cir. 1985).

The record supports Atwood's potential for success on the

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1. Petrobras also argues that the injunction does not preserve the *status quo* since at the time of the injunction hearing the letter of credit had expired. This argument is fallacious. The injunction appropriately preserves the *status quo* at the time the suit was filed and at the time of disagreements between the parties first arose. *Diamond v. Texas International Sulphur Co.,* 354 S.W.2d 595 (Tex.Ct. of Civ.App.1961); *Ferry-Morse Seed Co. v. Food Corn, Inc.,* 729 F.2d 589 (8th Cir.1984). The fact that there was a lengthy delay between the time that the suit was filed and the hearings were actually held was a matter of court congestion over which Atwood had no control.

2. The magistrate's report stated: "At the hearing plaintiffs bore their burden of proof to demonstrate that absent this Order they would suffer irreparable injury. In addition, plaintiffs have shown to the Court the likelihood of success with respect to some of their claims. It appears to this Court that the public interest is best served by the entry of this Order. Harm to defendant resulting from this injunction is less than the likely harm to plaintiffs by its refusal by this Court. Consequently, plaintiffs have met their burden under Rule 65 and a preliminary injunction should be entered."

merits. It shows (Volume 1, pages 50 to 80) that Atwood did two millions dollars worth of work for Petrobras for which it was not paid. The payment dispute centers around whether Petrobras should pay the money directly to Atwood or, as Petrobras contends, to Atwood's creditors who allegedly are trying to collect directly from Petrobras in Brazil. Petrobras also contends that it does not owe the full amount claimed by Atwood because of Atwood's allegedly inadequate performance. Nevertheless, it appears there is a substantial sum of money due Atwood and that is sufficient to show a potential for success on the merits.

The record also supports Atwood's contention that it would be irreparably harmed if the letter of credit expired. It reveals that: 1) Atwood's creditors extended it credit on the basis of the letter of credit; and 2) if Atwood cannot collect under the letter of credit it will be unable to continue its business operations or its lawsuit against Petrobras, and will lose most, if not all, of its financing.

Petrobras did not submit any evidence to contradict Atwood's claim that it will be forced into bankruptcy if the letter of credit is not maintained. It merely argues that Atwood will not be irreparably injured it the letter of credit expires because Petrobras has other assets in the United States subject to levy if judgment is rendered in Atwood's favor. It does not, however, offer evidence that these other assets exist. Petrobras's vague references to other property do not defeat Atwood's proof of impending irreparable injury. Petrobras directs our attention to cases holding that a preliminary injunction is an inappropriate remedy where the potential harm to the movant is strictly financial. This is true as a general rule but an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business. See *Wright and Miller,* Federal Practice and

Appendix A

Procedure: Civil § 2948, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). (threat of bankruptcy constitutes irreparable harm); *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir.1962) (no abuse of discretion where denial of injunctive relief would result in the destruction of movant's business), *John B. Hull, Inc. v. Waterbury Petroleum*, 588 F.2d 24 (2nd Cir.1978), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979) (possibility of going out of business is irreparable harm); *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir.1986) (threat to trade or business viability is irreparable harm). *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir.1971). (Irreparable harm found where, without injunction, movants would lose businesses and their ability to carry on their lawsuit would have been crippled, if not destroyed.)

A judgment for damages, acquired years after Atwood's business has been obliterated would not be a meaningful remedy. The district court did not abuse its discretion by granting Atwood's motion for preliminary injunction.

AFFIRMED.

APPENDIX B — ORDER OF THE FIFTH CIRCUIT DENYING MOTION FOR REHEARING DATED SEPTEMBER 19, 1989

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 88-2302
Summary Calendar

ATWOOD TURNKEY DRILLING, INC., ET AL

Plaintiffs-Appellees,

VERSUS

PETROLEO BRASILEIRO, S.A.,

Defendant-Appellant.

Appeal from the United States District Court For the Southern District of Texas
(CA-H-87-1488)
(September 19, 1989)

ON PETITION FOR REHEARING

Before GEE, RIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appendix B

The Application for Panel Rehearing correctly points out an error at page 4425 of the slip opinion in this matter in the last sentence of the first full paragraph of that page which reads "Article IX Paragraph B of the letter of credit states:." That sentence is hereby amended to read as follows:

> "Article IX Paragraph B of the financing agreement between Petrobras, First Interstate Bank and the Eximbank states:"

Additionally, the first sentence of the first full paragraph following the quotation on that page which reads "The instant case clearly relates to the letter of credit." is hereby deleted and the following is substituted therefor:

> "The instant case clearly relates to the letter of credit which is an activity contemplated by the financing agreement."

It is ordered that the Petition for Rehearing filed in this matter is hereby DENIED.

ENTERED FOR THE COURT:

s/ John M. Duhe, Jr.
John M. Duhe Jr.
United States Circuit Judge

APPENDIX C — PRELIMINARY INJUNCTION DATED FEBRUARY 26, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-1488

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICES DE ASSISTENCIA MARITIMA, LTDA.,

PLAINTIFFS

v.

PETROLEO BRASILEIRO S.A., INTERNOR TRADE, INC., AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.

DEFENDANTS

ORDER

The Court has received and reviewed the Memorandum and Recommendation filed by the United States Magistrate in the above-styled cause with corresponding objections. After due consideration, this Court concludes the findings and conclusions of the Recommendation are true and correct. It is therefore, accepted and adopted as the Order of this Court.

Accordingly, it is ORDERED a preliminary injunction should be entered. Further, defendant is ORDERED to extend or reinstate the letter of credit from California First Interstate Bank for the benefit of plaintiffs. It is ORDERED that defendant request the

Appendix C

EXIMBANK extend its guarantees to defendant for the benefit of plaintiffs. Both extensions are to continue until one year from the date of this Court's Order or until all issues are resolved by this Court pertinent to this letter of credit, which ever is greater.

Plaintiffs are ORDERED to continue the bond previously set by this Court. In addition, if defendant's costs of extensions with respect to the letter of credit and the EXIMBANK exceed the amount of the bond, plaintiffs are ORDERED to supplement their own bond to cover defendant's costs of these extensions.

DONE at Houston, Texas this 26th day of February, 1988.

s/ John V. Singleton, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D — RECOMMENDATIONS OF MAGISTRATE DATED FEBRUARY 26, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-1488

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICES DE ASSISTENCIA MARITIMA, LTDA.,

PLAINTIFFS

v.

PETROLEO BRASILEIRO S.A., INTERNOR TRADE, INC., AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.

DEFENDANTS

MEMORANDUM AND RECOMMENDATION

BEFORE THE COURT THIS DAY is the plaintiffs' motion for a temporary restraining order and/or preliminary injunction. The Court heard argument from the parties with respect to this motion this date. After due consideration, this Court has concluded that it should RECOMMEND that the following Order be entered:

I.

At the hearing plaintiffs bore their burden of proof to demonstrate that absent this Order they would suffer irreparable injury. In addition, plaintiffs have shown to the Court the

likelihood of success with respect to some of their claims. It appears to this Court that the public interest is best served by the entry of this Order. Harm to defendant resulting from this injunction is less than the likely harm to plaintiffs by its refusal by this Court. Consequently, plaintiffs have met their burden under Rule 65 and a preliminary injunction should be entered.

The Court ORDERS that defendant Petroleo be ORDERED to extend or reinstate the letter of credit from California First Interstate Bank for the benefit of plaintiffs. The Court ORDERS that defendant request that the EXIMBANK extend its guarantees to defendant for the benefit of plaintiffs. Both extensions are to continue until the pertinent issues in this case are resolved.

Plaintiffs are ORDERED to continue the bond previously set by this Court. In addition, if defendant's costs of extension with respect to either the letter of credit or the EXIMBANK guarantee exceed the amount of the current bond, plaintiffs are ORDERED to increase their own bond to cover defendant's costs of these extensions within ten days following notice by defendant Petroleo.

Anticipating the possibility of objection by defendant to this Court's RECOMMENDATION, all pleadings of the defendant are forwarded to Judge John V. Singleton for review and considered as objections to this Court's Order pursuant to 28 U.S.C. § 636(b)(1)(C).

DONE at Houston, Texas this 26th day of Feb., 1988.

s/ Karen K. Brown
KAREN K. BROWN
UNITED STATES MAGISTRATE

APPENDIX E — TEMPORARY RESTRAINING ORDER DATED JANUARY 28, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-1488

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA, LTDA.,

Plaintiffs,

V.

PETROLEO BRASILEIRO S.A., INTERNOR TRADE INC., AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.,

Defendants.

ORDER

On January 22, 1988, the parties to the above-styled action appeared before this Court for hearing on Plaintiff's Application for a Temporary Restraining Order. Having considered the motion, the argument of counsel, and the submissions of the parties, the Court concludes that irreparable harm would occur if a temporary restraining order is not issued and that the motion should be granted to the following extent:

It is ORDERED that Defendant Petroleo Brasileiro S.A. extend the expiration date of the Credit Letter with California First Interstate Bank currently due to expire on January 28, 1988.

Appendix E

The period of extension shall be 10 days from the signing of this order, subject to an additional 10-day extension should this matter not be set for preliminary injunction hearing before the expiration of the initial ten-day period. It is further ORDERED that Plaintiff post with the Court a security bond in the amount of $20,000.00.

SIGNED at Houston, Texas, on this 28th day of January, 1988, at 10:40 o'clock A.M.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX F — EXCERPTS OF PETROBRAS AGREEMENT WITH FIRST INTERSTATE BANK OF CALIFORNIA AND EXPORT-IMPORT BANK OF THE UNITED STATES

CONFIDENTIAL

PETROLEO BRASILEIRO S.A. — PETROBRAS

FIRST INTERSTATE BANK OF CALIFORNIA

AND

EXPORT-IMPORT BANK OF THE UNITED STATES

CREDIT AGREEMENT

Brazil

Eximbank Credit No. 7426
Guarantee No. 7427

Appendix F

[1] THIS AGREEMENT, made and entered into as of the 29th day of April, 1986, among PETROLEO BRASILEIRO S.A. — PETROBRAS (the "Borrower"), a corporation organized and existing under the laws of the Federative Republic of Brazil ("Brazil"); FIRST INTERSTATE BANK OF CALIFORNIA (the "Bank"), a banking corporation organized and existing under the laws of the State of California, United States of America; and EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA ("Eximbank"), an agency of the United States of America (Eximbank and the Bank being sometimes called, individually, "Lender", and collectively, the "Lenders").

WITNESSETH:

WHEREAS, the Borrower has requested the Bank to establish a credit (the "Bank Credit") and Eximbank to establish a credit (the "Eximbank Credit"; the Bank Credit and the Eximbank Credit being sometimes called, individually, a "Credit" and collectively, the "Credits") in its favor in the amounts set forth in Article I so that the Borrower may finance 85% of the costs incurred by the Borrower (the "U.S. Costs"), after July 11, 1985 for the acquisition in the United States and transfer to Brazil of services, equipment and material of United States origin as are approved by Eximbank as eligible for financing under this Agreement (the "Items") required for drilling services in the Campos Basin (the "Project");

WHEREAS, the Borrower will make cash payments for the purchase of the Items in an aggregate amount equal to not less than 15% of the U.S. Costs (the "Cash Payments");

WHEREAS, Banco Central do Brasil has given its approval to the Borrower to negotiate the indebtedness hereunder.

Appendix F

WHEREAS, Eximbank is prepared to issue its guarantee of the Bank Credit;

WHEREAS, the establishment of the Bank Credit and the Eximbank Credit will facilitate exports and imports and the exchange of commodities between the United States and Brazil; and

WHEREAS, on the basis of the foregoing and subject to the terms and conditions of this Agreement, the Bank is prepared to establish the Bank [2] Credit and Eximbank is prepared to establish the Eximbank Credit hereunder.

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

AMOUNT AND EXPIRY DATE OF THE BANK CREDIT AND THE EXIMBANK CREDIT

A. *Amount.* The Bank establishes the Bank Credit and Eximbank establishes the Eximbank Credit in favor of the Borrower in the amounts set forth below opposite its name.

Name of Lender	Credit
The Bank	$ 7,272,200
Eximbank	$23,634,650
Total	$30,906,850

B. *Expiry Date.* Disbursements under the Bank Credit and the Eximbank Credit may not occur subsequent to the close of

business on February 28, 1988 ("Expiry Date"), unless the Bank and Eximbank consent in writing to a later Expiry Date.

ARTICLE II

TERMS OF THE BANK CREDIT AND THE EXIMBANK CREDIT

A. *Repayment.* The Borrower shall repay all amounts disbursed under the Bank Credit and the Eximbank Credit as follows:

(1) *Bank Credit:* With respect to disbursements under the Bank Credit, in four consecutive semiannual installments, due on successive Interest Payment Dates (as defined in paragraph B of this Article II), commencing with the first Interest Payment Date falling after the Expiry Date. Each installment shall be in the amount of $1,818,050.00.

* * *

[Commencing at page 5]

The Borrower shall reimburse the Bank for any loss, cost or expense, including any loss of profit, in liquidating or employing deposits or borrowings in order to enable the Bank to fund the unpaid sum.

C. *Promissory Notes.* (1) The Borrower agrees that to evidence further its obligation to repay all amounts disbursed under the Bank Credit and the Eximbank Credit, with interest thereon, it shall issue and deliver to the Lenders promissory notes as follows:

Appendix F

(a) With respect to the Bank, a promissory note in the form of Annex A-1 hereto; and

(b) With respect to Eximbank, promissory notes in the form of Annexes A-2 and A-3 hereto.

(2) All notes delivered to the Lenders (each such note and any notes given in exchange therefor, being called, collectively, the "Notes" and, individually, a "Note") shall be:

(a) printed in the English language;

(b) dated as of their respective dates of issue;

(c) in the principal amounts specified above; and

(d) in conformity with the terms of this Agreement.

Each Note issued to the Lenders shall be valid and enforceable as to its aggregate principal amount only to the extent of the aggregate amount disbursed and outstanding under the Credit which it evidences, and, as to interest, only to the extent of the interest accrued from the dates and on the amounts of such disbursement.

D. *Reduction of Installments.* As of the close of business on the Expiry Date, each Lender shall cancel any undisbursed part of its Credit and apply said part equally to the reduction of each installment of principal outstanding under its Credit.

E. *Exchange of Notes.* Upon the written request of the Bank or Eximbank from time to time after the Expiry Date, the Borrower shall issue and deliver to the Bank or Eximbank in

exchange for any Note previously issued to the Bank or Eximbank its new Note or Notes as the Bank or

* * *

[Commencing at page 25]

(8) The Borrower winds up or dissolves its affairs or ceases to operate any portion of its business for a period in excess of 30 consecutive calendar days;

(9)(a) Any governmental authority shall take any action to condemn, seize or appropriate any of the properties or assets of the Borrower which, in the reasonable opinion of Eximbank, are essential to the successful operation of the Borrower's business or (b) any governmental authority or international financing agency shall take any action which, in the reasonable opinion of Eximbank, adversely and materially affects the ability of the Borrower to meet its obligations under this Agreement or the Notes in accordance with their respective terms and conditions; or

(10) Any of the authorizations, approvals or other acts referred to in paragraph A (2) of Article III hereof having been made or granted as provided in such subparagraph (2) is in any material respect revoked, rescinded, suspended, held invalid or otherwise limited in effect when still necessary or advisable for the purposes set forth in said subparagraph (2);

then, Eximbank with respect to the Eximbank Credit and the Bank Credit may, be written notice to the Borrower and the Bank (the

notice to the Borrower being deemed given when deposited in the mail or when transmitted by telegraph, telex or cable), make immediately due and payable (i) the entire principal amount thereof then outstanding, plus accrued interest thereon to the date of payment, and (ii) all other amounts owing under this Agreement and the Notes.

ARTICLE IX

JURISDICTION

A. *Submission to Jurisdiction.* Any legal action or proceeding arising out of or relating to this Agreement or the Notes may be instituted in the United States in any Federal or State court sitting in the State of California or in the District of Columbia, and the Borrower, in respect of itself and its properties and revenues, irrevocably submits to the non-exclusive jurisdiction of these courts in any such action or proceeding. The Borrower [26] irrevocably appoints the General Manager of its Office at 1221 Avenue of the Americas, New York, New York 10020, United States of America, as its agent to receive on behalf of itself and its properties and revenues service of process in these jurisdictions in any such action or proceeding. The failure of the agent to give notice to the Borrower of any such service shall not impair or affect the validity of such service or of any judgment rendered in any such action or proceeding based thereon. The Borrower also irrevocably consents to such service upon it by the mailing of copies thereof by U.S. air mail to the Borrower at its address set forth under its name on the signature pages of this Agreement; provided that service shall be accomplished in accordance with the applicable laws of Brazil with respect to proceedings in the Brazilian courts. The Borrower agrees that it will at all times maintain an agent to receive such service, as above provided. The

foregoing provisions shall not limit the right of the Bank or Eximbank to bring any such action or proceeding or to obtain execution on any judgment rendered in any such action or proceeding in any other appropriate jurisdiction or in any other manner. The Borrower agrees that final judgment against it in any legal action or proceeding arising out of or relating to this Agreement or the Notes shall be conclusive and may be enforced in any other jurisdiction within or outside the United States by suit on the judgment, a certified or exemplified copy of which judgment shall be conclusive evidence thereof and of the amount of its indebtedness, or by such other means provided by law.

B. *Waiver of Sovereign Immunity.* The Borrower acknowledges and agrees that the activities contemplated by the provisions of this Agreement and the Notes are commercial in nature rather than governmental or public and therefore acknowledges and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. The Borrower, in respect of itself and its properties and revenues, expressly and irrevocably waives any such right of immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) or claim thereto which may now or hereafter exist, and agrees not to assert any such right or claim in any such action or proceeding, whether in the United States or otherwise.

* * *

[Commencing at page 31]

hereunder and shall be addressed to the Borrower, Eximbank and the Bank to the appropriate party at the addresses set forth beneath their respective names on the signature pages hereto or at such

other addresses as such parties may designate in writing to the other parties to this Agreement.

L. *Benefit of Agreement.* This Agreement shall be binding upon and inure to the benefit of and be enforceable by each of the parties hereto and their respective successors and assigns; provided, however, that the Borrower may not assign or transfer its rights or obligations under this Agreement or the Notes without the prior written consent of the Bank and Eximbank.

M. *Amendment or Waiver.* No provision of this Agreement or the Notes may be amended, changed, waived, discharged or terminated except by an instrument in writing signed by the party against whom enforcement of the amendment, change, waiver, discharge or termination is sought.

N. *Judgment Currency.* If, for the purpose of obtaining a judgment in any court with respect to any obligation of the Borrower under this Agreement or the Notes, it becomes necessary to convert into any other currency any amount in Dollars due under this Agreement or the Notes, then that conversion shall be made at the buying spot rate of exchange in effect at the office of the Bank or Eximbank located at the address set forth under its name on the signature pages of this Agreement for freely transferable Dollars at the close of business on the day before the day on which the judgment is rendered. If there is a change in such rate of exchange prevailing between the day before the day on which the judgment is rendered and the date of payment of the judgment, the Borrower shall pay such additional amounts as may be necessary to insure that the amount paid on the date of payment is the amount in the other currency which, when converted at such rate of exchange in effect on the date of payment, is the amount in Dollars then due under this Agreement

or the Notes. In no event, however, shall the Borrower be required to pay more Dollars at such rate of exchange when payment is made than the amount of Dollars stated to be due under this Agreement or the Notes, so that in any event the Borrower's obligations will be effectively maintained as Dollar obligations. Any additional amounts owing by the Borrower pursuant to the provisions of this paragraph N shall be due as a separate debt and shall not be affected by or merged into any judgment obtained for any other amounts due under or in respect of this Agreement or the Notes.

APPENDIX G — EXCERPTS OF PETROBRAS AGREEMENT WITH RESPONDENTS

Berlitz Translation Services
3100 Richmond Avenue
Suite 101
Houston, Texas 77098
713 529-8110

No. H1885-B

/LOGO/ PETROBRAS
PETROLEO BRASILEIRO S.A.
/STAMP: DEPER CONTRACT NO. 094/85/

CONTRACT FOR VESSEL CHARTER AND WELL DRILLING SERVICES, MADE BETWEEN PETROLEO BRASILEIRO S/A - PETROBRAS AND ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA.

PETROLEO BRASILEIRO S/A/- PETROBRAS, a mixed-capital corporation created and existing under Law No. 2004, dated 10/3/53, with head offices at 65 Av. Republica do Chile, Rio de Janeiro, registered with the General Taxpayers Cadaster (CGC) of the Ministry of the Treasury under the No. 33.000.167/0001-01, represented herefor by Engineer HELIO LINS MARINHO FALCAO, General Superintendent of the Drilling Department (DEPER) hereinafter called PETROBRAS, and ATWOOD TURNKEY DRILLING, INC., with head offices at 15415 Katy Freeway, Suite 607, Houston, Texas, U.S.A., hereinafter called FOREIGN CONTRACTOR, represented herefor by its Managing President Mr. JOHN H. ATWOOD, and ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA., with head offices at 80 Rua

Appendix G

Senador Dantas, 17th floor, registered with the General Taxpayers Cadaster, under the No. 29.183.688/0001-74, represented herefor by its Manager Mr. AMERICO ATILIO TADEO SOMAGLINO hereinafter called BRAZILIAN CONTRACTOR, collectively designated CONTRACTORS, with the participation of ATWOOD DRILLING COMPANY LIMITED, with head offices at Grand Cayman, Cayman Islands, hereinafter called PARTICIPANT, represented herefor by its Managing President Mr. JOHN H. ATWOOD, jointly liable for full performance of the obligations herein assumed, have mutually established this Contract, to be governed by the following clauses and conditions:

(end of qualification)

CLAUSE TWENTY-TWO — REPRESENTATION

22.1 For the term of this Contract, FOREIGN CONTRACTOR agrees to maintain a representative with "ad judicia" powers in the City of Rio de Janeiro, State of Rio de Janeiro, Federal Republic of Brazil, including the power to receive initial summonses and participate in proceedings and to sign agreements in connection with disputes arising from this Contract; summons may be made by posted bill in the event of absence or lack of representative.

(end of clause)

CLAUSE TWENTY-FIVE — JURISDICTION

25.1 The Courts of the City of Rio de Janeiro, State of Rio de Janeiro, will be competent to rule upon any questions deriving from this Contract and the parties waive any other jurisdiction, regardless of privilege.

Appendix G

25.2 This Contract shall be governed by Brazilian legislation.

(end of clause)

Being thus in accord and agreement, the parties sign this Contract DEPER-094/85 in 5 (five) originals of equal tenor, in the presence of the undersigned witnesses.

Rio de Janeiro, /STAMP: 28 AUG 1985/

PETROLEO BRASILEIRO S/A — PETROBRAS

/signature/

HELIO LINS MARINHO FALCAO
General Superintendent,
Drilling Department

FOREIGN CONTRACTOR
ATWOOD TURNKEY DRILLING INC.

/signature/

JOHN H. ATWOOD
Managing President

BRAZILIAN CONTRACTOR
ATWOOD DO BRASIL—SERVICOS DE ASSISTENCIA MARITIMA LTDA.

/signature/

AMERICO ATILIO TADEO SOMAGLINO
Manager

Appendix G

PARTICIPANT
ATWOOD DRILLING COMPANY LIMITED
/signature/
JOHN H. ATWOOD
Managing President

WITNESSES:
/signature/
/signature/

APPENDIX H — ORIGINAL PETITION IN THE 165TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS, DATED APRIL 30, 1987

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS

165TH JUDICIAL DISTRICT

NO. 87-19787

ATWOOD TURNKEY DRILLING, INC., et al

VS.

PETROLEO BRASILEIRO S.A., et al

ORIGINAL PETITION

NOW COMES ATWOOD TURNKEY DRILLING, INC. and ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA. (hereinafter referred to jointly as "Atwood") and files this their Original Petition against PETROLEO BRASILEIRO S.A., INTERNOR TRADE INC., its one of its subsidaries (hereinafter referred to jointly as "Petrobras"), and would show the Court the following:

I.

ATWOOD TURNKEY DRILLING, INC. is a Texas Corporation doing business in Houston, Texas and ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA. is its Brazilian subsidiary.

Appendix H

II.

PETROLEO BRASILEIRO S.A. is a Brazilian Corporation doing business in Texas and Brazil and it may be served by service on its officer and director, Wagner Freire Oliveria e Silva, who is currently at the Four Seasons Hotel, 1300 Lamar, Houston, Texas.

INTERNOR TRADE INC. is a Petrobras subsidiary and it can be served on its registered agent of process, Robert M. Julian, 1003 Wirt Road, Houston, Texas 77055.

III.

On or about August of 1985, ATWOOD and PETROBRAS entered into a turnkey drilling contract in which ATWOOD would drill twenty-one (21) oil wells, later amended to seventeen (17) wells, and PETROBRAS would pay ATWOOD for their services.

IV.

On or about December 22, 1986, PETROBRAS unlawfully breached and terminated said contract. This breach was not justified and it caused ATWOOD to suffer severely damages. ATWOOD always stood ready to perform and did not breach the contract. These damages will exceed the jurisdictional limits of this Court. The damages include over Six (6) Million Dollars in damages for wells which ATWOOD had already drilled and for which it was not paid and over eight (8) Million Dollars in damages for profit it would have made had PETROBRAS not breached the contract. The actions of PETROBRAS amounted to an actual and constructive and/or anticipatory breach of contract. ATWOOD would further show the Court that it should

be awarded pre and post judgment interest, costs and attorneys fees in prosecution of this action.

V.

All conditions precedent to this action have been performed or occurred.

WHEREFORE, PREMISES CONSIDERED, ATWOOD prays that this Court grant judgment in its favor, and further more award its costs, pre and post judgment interest and reasonable attorney fees.

Respectfully submitted,

ANDREWS & KURTH

BY:
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ATTORNEYS FOR PLAINTIFFS
ATWOOD TURNKEY
DRILLING. INC., Et Al

APPENDIX I — PETITION FOR REMOVAL DATED MAY 13, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-87-_____

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA.,

Plaintiffs,

VS.

PETROLEO BRASILEIRO, S.A. AND INTERNOR TRADE, INC.,

Defendants.

DEFENDANT PETROLEO BRASILEIRO, S.A.'S PETITION FOR REMOVAL

TO THE HONORABLE, THE UNITED STATES DISTRICT JUDGES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

COMES NOW PETROLEO BRASILEIRO, S.A., a defendant in the above styled cause, and with the consent of defendant Internor Trade, Inc. files this its Petition for Removal of said cause to the United States District Court for the Southern District of Texas, Houston Division, and in support of such removal respectfully shows the Court as follows:

Appendix I

FIRST: Petitioner is one of the defendants in the above styled cause which has been filed in the 165th Judicial District Court of Harris County, Texas as "Atwood Turnkey Drilling, Inc., et al. vs. Petroleo Brasileiro S.A., et al." and is now pending as Cause No. 87-19787.

SECOND: "Petrobras" is the trade or business name of Petroleo Brasileiro, S.A., which is the correct name of this defendant. This defendant may be referred to hereafter by either name.

THIRD: This suit is of a civil nature at law and is one of which the district courts of the United States are given original jurisdiction in that it is a dispute filed by plaintiffs against an agency or instrumentality of a foreign state, as defined in 28 USC 1603(b)(2), commonly referred to as the Foreign Sovereign Immunities Act (F.S.I.A.).

FOURTH: Defendant Petroleo Brasileiro, S.A. is an agency or instrumentality of the Federative Republic of Brazil created by the laws of its Congress.

FIFTH: Defendant is entitled to removal based on 28 USC § 1441(d).

SIXTH: The time within which your petitioner is required by the laws of the United States, to-wit 28 USC § 1446(b), to file this Petition for Removal of the above cause has not yet expired.

SEVENTH: Petitioner presents herewith its surety bond in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, conditioned that petitioner will pay all costs and

disbursements incurred by reason of the removal proceedings, should it be determined that this case was not removable or was improperly removed.

EIGHTH: Upon the filing of this petition and bond for the removal of this cause, a written notice of filing is being given by petitioner to the plaintiffs as required by law as well as to the Clerk of the District Court in which this matter is now pending. A copy of said notice is attached hereto.

NINTH: A copy of all process, pleadings, and orders either served upon petitioner or the undersigned in this cause or among the file papers of the State Court are attached hereto.

TENTH: Petitioner would further show that the undersigned also represents Internor Trade, Inc., who consents to such removal.

WHEREFORE, petitioner prays that this Court take jurisdiction of this cause to its conclusion and to final judgment herein to the exclusion of any further proceeding in the 165th Judicial District Court of Harris County, Texas according to the statutes for such cause made and provided.

Respectfully submitted,

WILLIAM H. SEELE
1003 Wirt Road, Suite 306
Houston, Texas 77055
713/827-9990
Attorney-in-charge for
Defendants Petroleo
Brasileiro, S.A. and
Internor Trade, Inc.

Appendix I

OF COUNSEL:
PAUL S. AUFRICHTIG
Ninth Floor
300 East 42nd Street
New York, New York 10017
212/557-5040

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above instrument has been forwarded to all counsel of record by certified mail, return receipt requested, on this the _____ day of _____, 1987.

_____
WILLIAM H. SEELE

AFFIDAVIT

THE STATE OF TEXAS:

COUNTY OF HARRIS:

BEFORE ME on the undersigned date came William H. Seele, who is well known to me, and after first being duly sworn did on his oath state as follows:

> "I am over eighteen years of age and competent and able to testify. I am the attorney for Petrobras Brasileiro, S.A. and, according to the best of my knowledge, information and belief, state that the assertions in the aforegoing

instrument are true and correct based on information supplied to the undersigned by representatives of petitioner."

"This verification is being made by counsel because petitioner is an agency or instrumentality of a foreign sovereign nation, none of whose officers or directors are present within this jurisdiction to execute same."

_____

WILLIAM H. SEELE

SWORN TO AND SUBSCRIBED BEFORE ME on this the _____ day of _____, 1987.

_____

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

My Commission Expires:

_____

NO. 89-974

In the Supreme Court of the United States

October Term, 1989

PETROLEO BRASILEIRO, S.A.,
Petitioner,

vs.

ATWOOD TURNKEY DRILLING, INC.
AND ATWOOD DO BRASIL SERVICOS DE
ASSISTENCIA MARITIMA, LTDA.,
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA. IN OPPOSITION

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5701

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit correctly determined that the Foreign Sovereign Immunities Act did not bar the injunction entered by the District Court?
2. Whether the Court of Appeals for the Fifth Circuit correctly determined that, even if the order issued by the District Court was an attachment, the Petitioner contractually waived its right to sovereign immunity as is permissible under 28 U.S.C. 1610?
3. Whether this appeal is completely meritless since subsequent to filing the appeal in the Fifth Circuit Court of Appeals, the District Court struck the Petitioner's defenses under 28 U.S.C. 1602 et seq. due to its misconduct in discovery?
4. Whether the Court of Appeals for the Fifth Circuit had jurisdiction over this interlocutory appeal, and consequently, whether this Court has jurisdiction over this interlocutory appeal, since Petitioner claims the order in question is an attachment, and only the granting of an injunction, not an attachment, is subject to an interlocutory appeal under to 28 U.S.C. 1292?

PARTIES TO THE PROCEEDING

1. Atwood Turnkey Drilling, Inc. - Plaintiff, Appellee and Respondent

   Atwood do Brasil Servicos de Assistencia Maritima, Ltd - Plaintiff, Appellee and Respondent (hereinafter referred to jointly as "ATDI" or "Respondent")

2. Petroleo Brasileira, S.A. - Defendant, Appellant and Petitioner * (hereinafter referred to as "Petrobras" or "Petitioner")

   Internor Trade Inc. - Defendant Appellant **

3. International Underwater Contractors, Inc. - Defendant **

* Respondent has no means of informing the Court of all of the affiliated companies of Petroleo Brasileiro as is mandated by Rule 28.1. Nevertheless, discovery in this case has revealed that not all of its subsidiaries are wholly owned by Petrobras and if the Court in this case wishes further information it will need to direct any inquiry to the Petitioner.

** Although both Internor Trade, Inc. and International Underwater Contractors are parties to the ongoing litigation, neither has taken an active role in this appeal.

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TABLE OF AUTHORITIES

NO. 89-974

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

PETROLEO BRASILEIRO, S.A.,

Petitioner,

VS.

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA, LTD.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

This is an interlocutory appeal from the issuance of an injunction by the United States District Court for the Southern District of Texas (no reported decision) which was affirmed by the Court of Appeals for

the Fifth Circuit in an opinion published at 875 F.2d 1174 (5th Cir. 1989). The Court of Appeals made minor changes in wording on rehearing in an unpublished opinion.

REPLY TO STATEMENT OF JURISDICTION

If the Petitioner's statements to the effect that the District Court's order is an order of attachment (such statements being the entire crux of Petrobras' Petition) are taken as being accurate, then this Court does not have jurisdiction under 28 U.S.C. 1254(1) as alleged because interlocutory orders granting attachments are not appealable. (See point IV on page 24, infra.) To the contrary if this Court believes, as did the District Court and the Court of Appeals for the Fifth Circuit, that the order in question is an injunction, then this Court has jurisdiction under 28 U.S.C. 1254(1), but in so finding this Court by necessity must find that Petitioner's argument on appeal is meritless because 28 U.S.C. 1609 does not prohibit injunctions.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. 1254(1), 28 U.S.C. 1291, 28 U.S.C. 1292(1), 28 U.S.C. 1609, and 28 U.S.C. 1610.

1. U.S.C. 1254.(1)

> § 1254. Courts of appeals; certiorari; appeal; certified questions.
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. 28 U.S.C. 1291 (in pertinent part):

> § 1291 Final decisions of district courts
>
> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . . (Emphasis added).

3. 28 U.S.C. 1292(a)(1):

> § 1292. Interlocutory decisions
> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

(Emphasis added).

4. 28 U.S.C. 1609:

§1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter. (Emphasis added.)

5. 28 U.S.C. 1610(d) (in pertinent part):

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver,

STATEMENT OF THE CASE

A. Statement of Facts.

Petrobras contracted with ATDI to have ATDI drill seventeen oil wells for it. Petrobras breached this contract after ATDI drilled six producing wells because of the falling price of oil. ATDI was never paid for all the oil wells it drilled, nor was ATDI compensated for the money it lost by the refusal of Petrobras to allow it to complete the entire project. Petrobras admitted (and, in fact, has judicially admitted in the District Court in this case) that it owes ATDI millions of dollars, but has taken the position that it will not pay ATDI anything unless ATDI releases all of its other damages claims.

The contract between ATDI and Petrobras was based totally upon the ability of Petrobras to get financing from the Export-Import Bank (hereinafter "Exim"). This financing is available to certain foreign entities if they hire American contractors to do portions of the work. Since ATDI was a United States company, this Exim financing requirement was met. Petrobras used the Exim guarantee to establish a Credit Agreement and a Letter of Credit with First Interstate Bank of California. The

Credit Agreement provides for letters of credit to be used by Petrobras to pay for United States suppliers of services, equipment, and material of United States origin, approved by Eximbank and used in drilling in the Campos Basin. ATDI is, and Petrobras has not claimed otherwise, one of those suppliers. The origination language in the Credit Agreement states:

> [t]he Borrower (Petrobras) may utilize the Bank Credit and the Eximbank credit in the following two ways:
>
> (1) [omitted]
>
> (2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank . . . in favor of U.S. Suppliers of the Items. ["Items" being defined on p. 1 of the Credit Agreement as services, equipment, and materials of United States origin as are approved by Eximbank required for drilling services in the Campos Basin.] (Credit Agreement Article V, p. 19.) (See Appendix A).

Petrobras chose the second route, and pursuant to Article V of the Credit Agreement Petrobras established the letter of credit to pay ATDI. Article IX of the Credit Agreement that provided for the establishment of the letter of credit in favor of ATDI, states, in its pertinent part:

> *Waiver of Sovereign Immunity.* The Borrower [Petrobras] acknowledges and agrees that the activities contemplated by the provisions of this Agreement [i.e. including the provisions that provide for letters of credit] and the notes are commercial in nature rather than governmental or public and therefore acknowledge and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. (Credit Agreement Article IX, p. 26; emphasis added). (See Appendix A.)

The purpose of the Credit Agreement was to provide for and ensure payments to United States suppliers of goods and services for drilling activities in the Campos Basin. The only reason the Credit Agreement existed was because ATDI as an American supplier enabled Petrobras to obtain Eximbank financing. The Letter of Credit established pursuant to the Credit Agreement was specifically established to pay the sums owed ATDI. ATDI, as the beneficiary of the Letter of Credit, was to be paid on draws from the Letter of Credit. After Petrobras breached the contract, ATDI attempted to draw on the Letter of Credit for the sums it was owed, but the bank, acting on the orders of Petrobras, refused to pay.

In the meantime Petrobras attempted to cancel the Letter of Credit and, in effect, used all means at its disposal to insure that ATDI would not be paid, despite the fact that ATDI was indisputably owed millions of dollars.

B. Course Of Proceedings In The Courts Below.

Once it became clear that Petrobras would not voluntarily pay ATDI the money it owed, ATDI filed this action against Petrobras in the 165th Judicial District Court of Harris County, Texas. Petrobras responded to this lawsuit by removing the case to the United States District Court for the Southern District of Texas under the removal provision of §1330(a) and the Foreign Sovereign Immunities Act. 28 U.S.C. 1602 et seq. (hereinafter "FSIA"). It should be noted that since answering Petrobras has waived its contention that the Court does not have jurisdiction under the FSIA to hear this case. (See Appendix B.)

Due to the clear and convincing evidence that ATDI presented in favor of its motion, United States District Judge David Hittner granted a temporary restraining order and ordered Petrobras to extend the Letter of Credit. The Court also ordered ATDI to put up a

bond for $20,000, well in excess of any costs involved. ATDI immediately put up the bond. United States Magistrate Karen Brown held a hearing on a temporary injunction at which ATDI presented evidence exactly comporting with this Court's and the Fifth Circuit's requirements governing temporary injunctions. Judge Brown recommended a preliminary injunction be granted. United States District Court Judge John Singleton adopted her recommendation and entered the order in question.

This injunction was appealed to the United States Court of Appeals for the Fifth Circuit. That Court heard oral argument and affirmed the issuance of the temporary injunction. Petrobras has now filed a Petition for a Writ of Certiorari with this Court. Its only complaint before this Court is that the injunction is prohibited by 28 U.S.C. 1609. The Petition is without merit and should be denied.

During the course of the case and in response to the various defenses raised by Petrobras' answer (including those concerning the FSIA), ATDI sent interrogatories and requests for production to Petrobras

which inquired about the facts underlying these alleged defenses. Petrobras refused to answer these discovery requests. ATDI filed a Motion to Compel. Petrobras did not even reply to the Motion to Compel. At the time of the hearing on this injunction, they still had not answered the discovery. The District Court on several occasions ordered Petrobras to produce this discovery and Petrobras did not comply with these orders. Due to Petrobras' refusal to comply with discovery rules and obey court orders, the District Court granted a motion for sanctions pursuant to Fed. R. Civ. P. 37. One of the sanctions imposed was the striking of its defenses under the FSIA. (See Appendix B.)

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Foreign Sovereign Immunities Act Does Not Prohibit A Court From Entering An Injunction.

Initially, ATDI should state that Petrobras announced in open court, that it was conceding the jurisdictional question it had originally raised under the FSIA. Therefore, the question before this Court is not

jurisdiction under the FSIA, but whether the Fifth Circuit incorrectly affirmed an injunction keeping intact the Letter of Credit which underlies the contract in this case.

The FSIA was passed to protect American businesses that are doing business with foreign entities. It was not, as implied by Petrobras, passed solely to protect instrumentalities of foreign states. The express purpose of the Act was to restrict the immunity of foreign states in their public acts. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

A. Injunctions Are Not Prohibited By The Foreign Sovereign Immunities Act

The FSIA, 28 U.S.C. 1609, expressly limits the powers of a court to issue an order of "attachment arrest and execution." The order complained of by Petrobras is an injunction which does not attach, arrest or execute. Petrobras' claim that the Court cannot enter an injunction is unsupportable. As authority, Petrobras puts forth *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983). This case deals with a different fact situation. (Initially, it is an appeal from an order vacating a

prejudgment attachment. An order granting an attachment is not appealable interlocutorily.) Further, in *S&S* the American company actually seized the defendant's property including bank accounts and other assets worth over a million dollars. No Petrobras property was taken or can be taken under this order. In *S&S* the parties admitted the order in question was in reality an attachment. However, ATDI does not admit that this order is an attachment; and, indeed it is not. Finally, the order in *S&S* was against the foreign entity negotiating a letter of credit of which it was the beneficiary. The letters of credit in *S&S* were issued to the Romanian Bank. In the instant case, they were issued to ATDI. Since Petrobras is not the beneficiary of the Letter of Credit, none of its assets are affected.

Under Petrobras' theory of law, the District Court has no power to enjoin any kind of activity that a foreign entity may want to do; no matter how egregious, no matter how hideous. That was not the intent of Congress. If it were, it would have specifically stated that injunctions were also barred by the Act, instead of limiting 28 U.S.C. 1609 to attachments, arrests and executions. According to

Petrobras' theory, it can convert assets of ATDI or commit other untoward acts and no court in this nation can stop it. This reasoning is unfathomable, but it is the logical result of what Petrobras is arguing.

The courts which have faced this question have uniformly held that an injunction is not prohibited by the FSIA. In *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982), the Court dealt with a similar Letter of Credit situation. It first noted that the radio company, the instrumentality of the foreign state, was the beneficiary of the Letter of Credit (unlike Petrobras). Despite the fact that it was the beneficiary (and therefore the one who owned the Letter of Credit), the Court held that an injunction against payment was appropriate. In that case, unlike this one, the Court actually deprived the foreign state entity of the use of one of its assets; and in doing so held an injunction was appropriate under the FSIA. In *Sperry Intern. Trade, Inc. v. Government of Israel*, 689 F.2d 301 (2d Cir. 1981), the Second Circuit upheld an injunction prohibiting Israel from obtaining the proceeds of a Letter of Credit. *See also, Wylie v. Bank Melli of Tehran, Iran*, 577 F.Supp. 1148

(N.D. Cal. 1983) wherein an injunction was upheld. In *Wylie* the court especially noted the American company, like ATDI, had strong equities in its favor because it was a trustee for its creditors. The court also noted that the foreign entity, like Petrobras, would suffer no loss by the entry of the injunction.

The order in this case was an injunction. It is permitted by the FSIA and Petrobras has cited no applicable authority otherwise. The Court's order does not take any property of Petrobras. It does not attach anything. At most, it preserved ATDI's Letter of Credit pending judgment. Finally, any alleged cost to Petrobras is bonded by ATDI. This Petition is meritless and should be denied.

B. No Property Of Petrobras Is Subject To "Attachment, Arrest and Execution."

What the courts below noted, and what this Court should note is that no assets of Petrobras have been taken or seized or could be taken or seized under the order. Nor has Petrobras been restricted in the use of its assets in any manner. Petrobras admitted in its brief before the Fifth Circuit that the order "did not physically tie up the

funds of Petrobras . . . ." (Appellant's Brief, p. 14). Nor has Petrobras ever complained that ATDI could under any circumstances use the order in question to attach any property. Even if an argument could be made that a letter of credit, which is the document the injunction order addresses, could be attached, it would still have to be Petrobras' property for 28 U.S.C. 1609 to apply. This is not the case. The Letter of Credit and Exim financing were integral parts of the contract. The Exim financing paid for (or at least guaranteed) the Letter of Credit. The Letter of Credit was then issued by the bank for the benefit of ATDI. It was for ATDI's benefit, not Petrobras'. For Petrobras to even have an argument, it would have to be the beneficiary of the Letter of Credit.

Assuming *arguendo* that the order is an attachment, it would be controlled by Rule 64, Federal Rules of Civil Procedure. Rule 64 dictates "all remedies providing for seizure of person or property . . . are available under the circumstances and in the manner provided by the law of the state in which the district court is held." In Texas, as well as most other jurisdictions, letters of credit are considered contracts between the issuer and the

beneficiary. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984). This principle has been recognized by federal appellate courts, as well as in state courts. For example, in *Bank of Newport v. First Nat'l Bank & Trust Co.*, 687 F.2d 1257 (8th Cir. 1982) the court held that it is a cardinal principal of law that the obligation of the issuer of a Letter of Credit (the bank) to pay a beneficiary (ATDI) is independent from the relationship between the customer (Petrobras) and the beneficiary (ATDI). In the instant case, the issuer is First Interstate Bank of California and the beneficiary is ATDI. (Vol. 1, pp. 71-73). The letter of credit belongs to ATDI. Consequently no property of Petrobras is affected, even if the Court's order is an attachment.

The order in question is clearly an injunction. Injunctions are not prohibited by 28 U.S.C. 1609. It does not attach, arrest or execute upon any property of Petrobras. All the order does is maintain the status quo pending the determination of the issues in this case. The Petition is meritless and should be denied.

II.

ASSUMING ARGUENDO THAT THE ORDER COMPLAINED OF IS AN ATTACHMENT, IT IS NOT PROHIBITED BY THE APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT BECAUSE PETROBRAS WAIVED ITS IMMUNITY.

The Fifth Circuit correctly noted that Petrobras waived any immunity it might have by its contractual dealings in this case pursuant to 28 U.S.C. 1610(d). The key to Petrobras and ATDI doing business was whether ATDI could help Petrobras obtain Eximbank financing. Once ATDI enabled Petrobras to qualify for Eximbank financing, the parties involved entered into the Credit Agreement. The Credit Agreement, itself, provides for letters of credit to be used by Petrobras to pay United States suppliers of services, equipment and material of United States origin, approved by Eximbank and used in drilling the Campos Basin. ATDI, is and Petrobras has not claimed otherwise, one of those very suppliers. The origination language in the Credit Agreement states:

> [t]he Borrower [Petrobras] may utilize the Bank Credit and the Eximbank credit in the following two ways:
>
> (1) [omitted]
>
> (2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank . . . in favor of U.S. Suppliers of the Items. ["Items" being defined on p. 1 of the Credit Agreement as services, equipment, and materials of United States origin as are approved by Eximbank required for drilling services in the Campos Basin.] (Credit Agreement Article V.)

Petrobras chose the second route, and pursuant to Article V of the Credit Agreement established the letter of credit to pay ATDI. This was done under the terms of the Credit Agreement Article V. Petrobras cannot claim with any credibility the Credit Agreement does not relate to the letter of credit. Petrobras in its Petition to this Court admits that it " . . . waived all its sovereign rights in any legal action arising out of or relating to . . . " the Credit Agreement. (Petrobras Petiton p. 6). The Fifth Circuit correctly found that the entire purpose of the Credit Agreement was to ensure that American suppliers would be paid and the letter of credit was one of the two available

means for Petrobras to do it. There is no doubt the Letter of Credit related to the Credit Agreement.

The waiver of sovereign immunity in the Credit Agreement is not limited to certain provisions of the Credit Agreement as Petrobras claims. By its very language it extends to all of the provisions of the Credit Agreement and all activities "related to" or "contemplated by" by the Credit Agreement. This includes, by virtue of Article V, the letter of credit in favor of ATDI. The waiver states in pertinent part:

> *Waiver of Sovereign Immunity.* The Borrower acknowledges and agrees that the activities contemplated by the provisions of this Agreement [i.e. including the provisions that provide for letters of credit] and the notes are commercial in nature rather than governmental or public and therefore acknowledge and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. (Credit Agreement, Article IX., p. 26 emphasis added).

The letter of credit in favor of ATDI created by the provisions of the Credit Agreement is certainly an

activity "contemplated by the provisions of this Agreement." To reach the conclusion that Petrobras wants, this Court would have to ignore the clear language in Article V. The legal action extending ATDI's letter of credit is unquestionably a "legal action or proceeding arising out of or relating to this Agreement" because the Letter of Credit arises out of and relates to the Credit Agreement. Furthermore, the immunity applies to "all activities . . . arising out of or relating to this agreement. . . ." The drilling in the Campos Basin is just such an activity. It is not only related to the agreement, it is the entire reason for the agreement.

Petitioner's own authority does not support its claim. In *Schwartz v. Merchants Bank of New York*, 490 N.Y.S.2d 194 (1st Dep't. 1985) no claim was ever made that the foreign sovereign expressly waived its immunity. The citation of *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2nd Cir. 1982), is even more perplexing. That opinion supports the Fifth Circuit decision in this case. In *Libra* the Court held the attachment to be proper even though the words "prejudgment attachment" were

not specifically used in the waiver provision. One need only compare the *Libra* waiver provision with the one in this case to see how much broader the waiver language is in the instant case. If the attachment was appropriate in Libra; it certainly would be appropriate here.

Petrobras' attempt to cite authority that ATDI as the beneficiary of the Letter of Credit is not entitled to rely on contractual waiver provisions is quite feeble. It cites four different personal injury cases that do not even deal with attachments. They deal with jurisdiction. Petrobras waived any and all jurisdictional defenses it might have had under the FSIA in open court. (See Appendix B.) Its use of personal injury jurisdictional cases is at best a weak attempt to cloud the issues. ATDI helped arrange and establish the Credit Agreement that created its Letter of Credit. Without one there could not be the other. The entire record in this case supports this conclusion. None of the evidence is to the contrary. For Petrobras to now claim these are separate transactions and that they are not related is beyond belief.

The only reason the Credit Agreement existed was because ATDI as an American supplier enabled Petrobras to obtain Eximbank financing. The purpose of the waiver was to protect the United States suppliers. For Petrobras to claim otherwise is contrary not only to the obvious intent, but also to the express language of the Credit Agreement. Consequently, the Court below was correct in holding Petrobras had waived its immunity as a foreign sovereign.

III.

THE PETITION IS MERITLESS, OR ALTERNATIVELY MOOT, BECAUSE THE DISTRICT COURT HAS STRUCK THE PLEADINGS OF PETROBRAS WHICH RAISE THE ISSUE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

One of the most troublesome problems involved in an interlocutory appeal and one of the reasons this Court has exercised certiorari jurisdiction in interlocutory cases sparingly is the lack of a full record. As Justice Brennan has written "we have made mistakes in granting appeals at an interlocutory state of a case when allowing the case to proceed might produce a result that makes it unnecessary to address an important and difficult constitutional question . . . ." Brennan, "Some Thoughts

On The Supreme Court Workload," 66 Judicature 230 (1983).

Justice Brennan's "thoughts" are certainly appropriate to this appeal. Subsequent to the filing of the appeal, the District Court struck all of Petrobras' defenses concerning the FSIA. (See Appendix B.) Since Petrobras can no longer rely on that defense, the issue it attempts to raise before this Court is meritless, or at least moot. The District Court held because of Petrobras' dilatory conduct and failure to follow Court orders that:

> the defenses of sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602-1611 (1982) [which includes §1609 that prohibits prejudgment attachment] . . . shall be established in favor of the plaintiff [ATDI] as permitted by Rule 37(b)(2) of the Federal Rules of Civil Procedure. (Emphasis added.)

The Court further ordered:

> that Petrobras' defenses pertaining to the Sovereign Immunity Act . . . are established in favor of Atwood Turnkey Drilling, Inc. in this action.

Petrobras did not appeal these findings and, in fact, signed a stipulation that specifically left the Rule 37 sanctions intact. (See Appendix C). This stipulation has been filed with the Court and under the Southern District of Texas local rule 2(G) is effective as an agreement between the parties.

Petrobras' sole argument is based upon 28 U.S.C. 1609, a defense which has been held in ATDI's favor by Court order. Any argument it might have had under the FSIA (which ATDI has shown is contrary to the express language of the applicable documentation in question) no longer exists. The Petition is meritless and should be denied.

IV

ASSUMING ARGUENDO THE ORDER COMPLAINED OF IS AN ATTACHMENT, THIS COURT DOES NOT HAVE JURISDICTION BECAUSE ATTACHMENTS ARE NOT THE PROPER SUBJECT OF AN INTERLOCUTORY APPEAL

Petrobras has brought this appeal claiming that the District Court's order is, in effect, an attachment. Assuming *arguendo* that the order is an attachment, the Fifth Circuit had no jurisdiction to hear the matter. If the Court of Appeals has no jurisdiction to hear the matter,

then this Court is without jurisdiction to grant a petition for writ of certiorari. 28 U.S.C. 1254 requires that a case be properly "in" the Court of Appeals in order for this Court to review a petition for certiorari.

The basic requirement for review is that the jurisdiction of the Court of Appeals must have been properly invoked under the general statutory provisions for reviewing a district court order. 17 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4036 (1977) (hereinafter "Wright"); 16 Wright at § 4004. Petrobras claimed that the appellate court obtained jurisdiction by virtue of 28 U.S.C. 1292(a)(1). That statute, however, confers jurisdiction only as to interlocutory appeals from certain injunctive orders. The Fifth Circuit finding that the order was an injunction, held it had jurisdiction. An attachment is not an injunction. 16 Wright, at § 3922. Therefore, if, the order is an attachment as Petrobras argues, no interlocutory appeal lies. The general rule is that attachments and orders confirming same are not appealable by an interlocutory appeal. *Constructora Subacuatica Diavaz S.A. v. M/V*

Hiryu, 718 F.2d 690, 692 (5th Cir. 1983) and *Astarte Shipping Company v. Allied Steel & Export Service*, 767 F.2d 86, 88 (5th Cir. 1985). See also, 16 Wright at § 3922; 11 Wright at § 2936; *Lowell Fruit Co. v. Alexander's Market, Inc.*, 842 F.2d 567, 569 (1st Cir. 1988); *United States v. Hansen*, 795 F.2d 35 (7th Cir. 1986); *Rosenfeldt v. Comprehensive Accounting Serv. Corp.*, 514 F.2d 607, 609 (7th Cir. 1975); and 28 U.S.C. 1291.

In *House v. Mayo*, 324 U.S. 42, 65 S. Ct. 517, 89 L.Ed. 739 (1945), this Court held that a petition for certiorari could not be granted under section 240(a) of the judicial code (predecessor to section 1254) due to a procedural defect. The case was not properly "in" the Court of Appeals. In the opinion, the Court stated "our authority under that section [240(a)] extends only to cases 'in a circuit Court of Appeals' .... Here the case was never 'in' the Court of Appeals." Id. at 44. See also, *Ferguson v. District of Columbia*, 270 U.S. 633, 657, 46 S. Ct. 355, 70 L.Ed. 771 (1926); and *Good Shot v. United States*, 179 U.S. 87, 21 S. Ct. 33, 45 L. Ed. 101 (1900). This line of reasoning has been cited authoritatively as recently as

1981. In *Davis v. Jacobs*, 454 U.S. 911, 102 S. Ct. 417, 70 L. Ed. 2d. 226, 227 (1981), Justice Stevens writing for the Court stated: "The Court has consistently followed *House v. Mayo* for over 35 years." Id. at 913. See also, *Hicks v. District of Columbia*, 383 U.S. 252, 86 S. Ct. 798, 15 L. Ed. 2d 744 (1966).

Therefore, if this Court finds the order about which Petitioner complains to be an attachment, then the Court of Appeals did not have interlocutory jurisdiction to review the subject matter of the appeal. If this appeal was never properly "in" the Court of Appeals, this Court does not have jurisdiction under 28 U.S.C. 1254 as claimed by Petitioner. As such this Court must either deny the Petition or remand this case to the Court of Appeals with instructions to dismiss the appeal. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 18, 51 S. Ct.. 8, 75 L. Ed. 135 (1930).

CONCLUSION

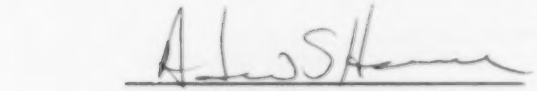
This case for a variety of reasons is not the proper subject matter for an interlocutory writ of certiorari. The District Court's injunction order was a correct one. An injunction does not violate the dictates of 28 U.S.C. 1609; that statute applies only to attachments. No property of Petrobras is arrested, attached or executed upon by virtue of the order. Furthermore, even if the order constituted an attachment, Petitioner waived any right to claim the defense of sovereign immunity. Additionally, should this Court accept Petitioner's argument that the District Court's order is an attachment, then this Court does not have jurisdiction to grant a writ of certiorari.

Finally, this Court should note that the entire appeal is meritless. The District Court has struck all claims and defenses that Petitioner has under the Foreign Sovereign Immunities Act. That being the case Petrobras cannot longer claim it has any protection under 28 U.S.C. 1609. Petrobras' entire basis for appeal no longer exists.

Each of these reasons standing alone would be sufficient cause for this Court to deny the petition. When all of the reasons are added together, the inescapable

conclusion is that the Court of Appeals was correct in its judgment and that the Petition for Writ for Certiorari should be denied.

Respectfully submitted,



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PROOF OF SERVICE

I, Andrew S. Hanen, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Petition for a Writ of Certiorari on the Petitioner and all other interested attorneys by enclosing three copies in an envelope by certified mail, return receipt requested addressed to:

Paul S. Aufrichtig
300 East 42nd Street
New York, New York 10017
Attorney for Petitioner and
for Internor Trade, Inc.

and

Bruce Feichtinger
Bracewell and Patterson
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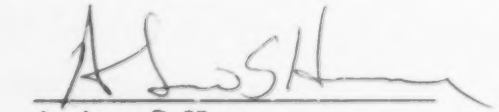
Pennzoil Place
Houston, Texas 77002

Attorneys for Defendant,
International Underwater
Contractors, Inc.

and depositing same in the United States mail at Houston, Texas on this the 15th day of January, 1990.



Andrew S. Hanen

APPENDIX A
EXCERPTS OF CREDIT AGREEMENT ESTABLISHED BY PETROBRAS TO PAY UNITED STATES SUPPLIERS

(commencing at page 1)

WHEREAS, the Borrower has requested the Bank to establish a credit (the "Bank Credit") and Eximbank to establish a credit (the "Eximbank Credit"); the Bank Credit and the Eximbank Credit being sometimes called, individually, a "Credit" and collectively, the "Credits") in its favor in the amounts set forth in Article I so that the Borrower may finance 85% of the costs incurred by the Borrower (the "U.S. Costs"), after July 11, 1985 for the acquisition in the United States and transfer to Brazil of services, equipment and material of United States origin as are approved by Eximbank as eligible for financing under this Agreement (the "Items") required for drilling services in the Campos Basin (the "Project");

WHEREAS, the Borrower will make cash payments for the purchase of the Items in an aggregate amount equal to not less than 15% of the U.S. Costs (the "Cash Payments");

WHEREAS, Banco Central do Brasil has given its approval to the Borrower to negotiate the indebtedness hereunder;

WHEREAS, Eximbank is prepared to issue its guarantee of the Bank Credit;

WHEREAS, the establishment of the Bank Credit and the Eximbank Credit will facilitate exports and imports and the exchange of commodities between the United States and Brazil; and

(commencing at page 19)

ARTICLE V

UTILIZATION PROCEDURES

When all applicable conditions precedent have been complied with, and subject to the other provisions of this Agreement, including Annex B, which is a part hereof, the Borrower may utilize the Bank Credit and the Eximbank Credit in the following two ways:

(1) The Borrower may request a disbursement from the Lenders to reimburse the Borrower for the financed portion of payments made by it to the U.S. suppliers of the Items; and

(2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank (the Bank in this capacity called the "L/C Bank") in favor of the U.S. suppliers of the Items.

(commencing at page 26)

B. *Waiver of Sovereign Immunity.* The Borrower acknowledges and agrees that the activities contemplated by the provisions of this Agreement and the Notes are commercial in nature rather than governmental or public and therefore acknowledges and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. The Borrower, in respect of itself and its properties and revenues, expressly and irrevocably waives any such right or immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) or claim thereto which may now or hereafter exist, and agrees not to assert any such right or

claim in any such action or proceeding, whether in the United States or otherwise.

APPENDIX B
ORDER OF JUDGE HITTNER
SIGNED MAY 29, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIME LTDA.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO.
PETROLEO BRASILEIRO, S.A., INTERNOR TRADE, INC. AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.,	§	H-87-1488
Defendants.	§	

ORDER

Pending before this Court is the Objection of Petroleo Brasileiro, S.A. ("Petrobras") to Magistrate's Order Dated August 23, 1988 (Document #103). Judge Lake initially reviewed Magistrate Brown's order. Judge Lake subsequently vacated his September 19, 1988, Order (Document #109) adopting the Magistrate's findings. Judge Lake has also since recused himself. It therefore

falls upon this Court to review Magistrate Brown's rulings on Plaintiffs' motions for sanctions.

RULE 11 AND 28 U.S.C. § 1927 SANCTIONS

Nondispositive pretrial orders of a magistrate are reviewable under a clearly erroneous or contrary to law standard. 28 U.S.C. § 636(b)(1)(A) (1982); Fed. R. Civ. P. 72(a). An order granting monetary sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure is considered nondispositive. *Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 952 (D. Del. 1987). Thus, Magistrate Brown's order imposing monetary sanctions for violations of Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 is a nondispositive order. Accordingly, this Court will apply the "clearly erroneous" standard of review in its review of those sanctions.

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc), and its progeny guide the imposition of sanctions pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 in the Fifth Circuit. *Thomas* requires that a court impose sanctions once a violation of Rule 11 is found. Id. at 876. The Court, however, is vested with "considerable discretion in

determining the 'appropriate' sanction to impose." Id. at 877. *Thomas* also does not require courts to make specific findings in all cases, id. at 883, although "the degree and extent to which a specific explanation must be contained in the record will vary accordingly with the particular circumstances of the case .... If the sanctions imposed are substantial in amount ... review of such awards will be inherently more rigorous" and "such sanctions must be quantifiable with some precision." Id. at 833.[1]

Additionally, before sanctions in the form of reimbursed expenses may be imposed, Fifth Circuit jurisprudence requires that to be reimbursable, the expenses must have been caused by the violation; they must be reasonable, *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 130 (5th Cir. 1988); and the party seeking reimbursement must have exercised his "'duty to mitigate those expenses, by correlating his response, in hours and funds expended, to the merit of the claims.'" *Willy v.*

---

1. These observations apply equally to sanctions imposed pursuant to 28 U.S.C. §1927. *Smith Internat'l, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1197 (5th Cir. 1988).

Coastal Corp., 855 F.2d 1160, 1172 (5th Cir. 1988) (quoting *Thomas*, 836 F.2d at 879).

Reviewing Magistrate Brown's order subject to the foregoing guidelines, this Court finds such order erroneous with respect to its imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The order fails to set forth with any specificity the factual basis supporting an imposition of sanctions, as *Thomas* indicates are necessary given the severity of the sanctions.

Additionally, the information concerning the accrual of attorney's fees is derived solely from affidavits appended to Plaintiffs' Motion for Sanctions. Given the sizable amount of attorney's fees allegedly incurred and, as such, the greater degree of scrutiny expected of this Court, the Court finds that the affidavits fail to provide detail sufficient for this Court or the magistrate to assess the correlation between the stated expenses and fees and any violation of Rule 11. See *Foval*, 841 F.2d at 130. The Court also notes that even if the fees are attributable solely to the violations, actual expenses and fees are not automatically deemed reasonable. *Willy*, 855 F.2d at 1172.

RULE 37

Courts review dispositive orders or recommendations of a magistrate de novo. 28 U.S.C. § 363(b)(1)(B) 1982); see *Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 594 F. Supp. 583, 585 (D. Me. 1984). Courts generally view orders providing sanctions for abuse of discovery under Rule 37 of the Federal Rules of Civil Procedure as nondispositive, see 12 C. Wright & A. Miller, Federal Practice and Procedure § 3076.5 (Supp. 1988). When such orders, however, impose sanctions which can significantly affect the nature of the litigation, courts will deem the motions dispositive, see id., and will conduct a de novo review.

In addition to ordering sanctions pursuant to Rule 11 and section 1927, Magistrate Brown also recommends that as a sanction under Federal Rule of Civil Procedure 37(b)(2)(A) for additional discovery abuses, Defendant's defenses pertaining to the Sovereign Immunities Act, improper service, personal jurisdiction, and forum non conveniens be established in favor of the Plaintiff. Defendant, however, claims to have waived all affirmative defenses, except the forum selection clause defense, prior

to Magistrate Brown's order, thus mooting her recommendations. Nonetheless, this Court will review the magistrate's recommendations. Moreover, because a recommendation that affirmative defenses be established for the Plaintiff may so seriously influence the nature, cause, and quality of an action as to be dispositive, the Court will conduct such review de novo.

The record reflects that Defendant's dilatory conduct compelled Magistrate Brown to enter three separate orders, on March 17, 1988 (Document #43), April 6, 1988 (Document #50), and May 16, 1988 (Document #71), directing Defendant to comply with Plaintiff's discovery requests. Nonetheless, despite the magistrate's efforts to resolve the recurrent discovery disputes, Defendant persisted in its objections. Accordingly, based upon a review of the record, this Court concurs with and adopts the magistrate's findings concerning Defendant's failure to cooperate in discovery.

Additionally, this Court concludes that in the event Defendant decides to reassert the defenses of sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982), and forum non

conveniens,[2] such defenses shall be established in favor of Plaintiff, as permitted by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

In accordance with the foregoing, the Court hereby ORDERS:

(1) that Magistrate Brown's order imposing monetary sanctions be vacated and the case remanded. Given the severity of the sanctions, this Circuit requires a court to make specific findings concerning the conduct violative of Rule 11, based on evidence of specific billing costs and fees sufficient to enable the Court to determine that the costs and fees sought were both reasonable and actually incurred in connection with the alleged violation;

(2) that to facilitate the magistrate's issuance of specific findings pertaining to the above, Plaintiff shall produce to the magistrate, for an in camera review, a more detailed schedule of the costs and fees

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2. The defenses of lack of personal jurisdiction of Plaintiff and improper service may never be asserted once waived. Fed. R. Civ. P. 12(h)(1). Therefore, if Defendant Petrobras has in fact formally waived any objections to lack of personal jurisdiction and improper service, there is no need for the Court to find them in favor of Plaintiff.

incurred by Andrews & Kurth and Peter Curran in connection with the Rule 11 violation asserted; and

(3) that Petrobras' defenses pertaining to the Sovereign Immunity Act, improper service of process, lack of personal jurisdiction, and forum non conveniens are established in favor of Atwood Turnkey Drilling, Inc., in this action.

SIGNED at Houston, Texas, on this 29 day of May, 1989.

/S/
DAVID HITTNER
United States District Judge

APPENDIX C
STIPULATION BETWEEN THE PARTIES
FILED OF RECORD JULY 12, 1989

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIME LTDA.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO.
PETROLEO BRASILEIRO, S.A., INTERNOR TRADE, INC., AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.,	§	H-87-1488
Defendants.	§	

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for Plaintiffs and Defendants, Petroleo Brasilerio S.A. ("Petrobras") and Internor Trade, Inc., as follows:

1. Concurrent with the execution of this stipulation by counsel for Plaintiffs, Petrobras will pay to Plaintiffs US$31,000.00 to settle the amount of monetary

sanctions that was to be determined by Magistrate Brown under the May 29, 1989 Order. The parties agree that the portions pertaining to Rule 37 of Judge Hittner's May 29, 1989 Order are not affected by this stipulation.

2. Plaintiffs herewith withdraw with prejudice the following:

A. Plaintiffs' Motion to Strike Petrobras' Pleading and For Sanctions dated April 28, 1989; and,

B. Plaintiffs' Response to Cross-Motion For Sanctions and Supplemental Response by Petroleo Brasilerio dated June 7, 1989.

3. Petrobras and Internor Trade, Inc., respectively, withdraw with prejudice:

A. Petrobras' Motion to Strike Plaintiffs' Supplemental Reply to Petrobras' Amended Motion to Dismiss dated May 12, 1989;

B. Petrobras' Reply to Atwood's Motion and Cross-Motion For Sanctions dated May 18, 1989, and Petrobras' Supplemental Responses and Cross-Motion dated May 26, 1989; and,

C. Internor's Motion to Dismiss and Motion For Sanctions dated May 12, 1987 (reserving, however, that section of the application seeking dismissal of the complaint against it).

/S/	/S/
Attorney for Plaintiffs,	Attorney for Defendants,
Atwood Turnkey Drilling, Inc.	Petrobras & Internor
and Atwood Do Brasil Servicos	Trade, Inc.
De Assistenola Maritima Ltda.	PAUL S. AUFRICHTIG
ANDREW S. HANEN	